Supreme Court, U.S.
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No. 96-1588

In The

Supreme Court of the United States

October Term, 1996

KIMBERLY CLARK,

Petitioner,

v.

KATHY BURNS and THE ELECTRIC POWER BOARD OF CHATTANOOGA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CARLOS C. SMITH,
Counsel of Record
CHRISTINE MABE SCOTT
J. ROBIN ROGERS
Attorneys for Respondents
STRANG, FLETCHER, CARRIGER, WALKER, HODGE & SMITH, PLLC
400 Krystal Building
One Union Square
Chattanooga, Tennessee 37402
(423) 265-2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF INTERESTED PARTIES

The Petitioner is Kimberly Clark.

The Respondents are Kathy Burns and the Electric Power Board of Chattanooga, an official board of the City of Chattanooga, Tennessee. Counsel for Ms. Burns and the Electric Board of Chattanooga are counsel of record Carlos C. Smith, and Christine Mabe Scott and J. Robin Rogers.

This response brief is filed on behalf of all Respondents.

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RESPONDENTS' BRIEF IN OPPOSITION

PRIOR COURT OPINIONS

Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit"). The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported and is not recommended for full text publication pursuant to the rules of that court. The unpublished Memorandum of the Sixth Circuit is reproduced at Appendix pp.1-8. The decision of the United States District Court for the Eastern District of Tennessee (hereinafter "District Court") also has not been published. The unpublished Memorandum of the District Court is reproduced at Appendix pp.9-20.

STATEMENT OF JURISDICTION

The Electric Power Board of Chattanooga does not contest this Court's jurisdiction over the claims asserted against it. The jurisdiction of this Court over the Respondent Kathy Burns is disputed, because the Petition does not raise as error the appellate court's decision dismissing all claims against her.

STATEMENT OF THE CASE

The Respondents respectfully oppose the petition for Writ of Certiorari (hereinafter "the Petition") which is based upon numerous misstatements of both the facts and of applicable law in this case.

A. Course of Proceedings and Disposition of the Case Below.

The Petitioner Kimberly Clark (hereinafter "Ms. Clark", "Petitioner", or "Plaintiff") filed her Complaint against her former employer, the Respondent Electric Power Board of Chattanooga (hereinafter "EPB") and her former supervisor, the Respondent Kathy Burns, (hereinafter "Ms. Burns") following Ms. Clark's dismissal from employment with EPB. (JA 9-13)[1]. This case was then removed from the Circuit Court of Hamilton County, Tennessee, to the District Court. (JA 14-15). Ms. Clark admitted in her Complaint that she was provided a hearing at the time of her dismissal from her employment, but argued that this hearing was procedurally defective and in violation of her alleged due process rights. Ms. Clark asserted a Section 1983 claim against EPB. (JA 10-11). Ms. Clark also claimed that she had been defamed by statements allegedly made by Ms. Burns, and asserted a state law claim for defamation against Ms. Burns. (JA 11-12).

EPB and Ms. Burns filed separate motions for summary judgment on all claims against them. (JA 33-56, 119-44). In support of their motions, EPB and Ms. Burns filed portions of the deposition testimony of Kimberly Clark (JA 57-100);[2] the Affidavit of Kathy Burns (JA

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[1] References are to the Joint Appendix as submitted to the United States Court of Appeals for the Sixth Circuit, designated "JA" and the appropriate page number.

[2] Under Local Rule 26.2 of the United States District Court for the Eastern District of Tennessee, only those portions of the deposition testimony to be relied upon in support of a motion for summary judgment are to be filed with the Court.

146-51); the Affidavit of Alice Glenn (JA 157-61); and the Affidavit of Ron Earl (JA 152-56). In response to these Motions, Ms. Clark filed only the deposition transcript of Ron Earl as opposing evidence. (JA 165-231). The District Court granted the motions of EPB and Ms. Burns, and dismissed all claims against them with prejudice. Specifically, the District Court found that the Plaintiff had failed to provide any evidence establishing a protected property interest in her employment, and that Ms. Clark had been provided with all the due process protection to which she would have been entitled even if such a property interest had been present. (Appendix pp.14-18). The District Court also dismissed the defamation claim against Ms. Burns.[3]

The Petitioner then appealed this decision to the Sixth Circuit. The Sixth Circuit subsequently affirmed the District Court's decision to dismiss all claims against EPB and Ms. Burns. In reaching its decision, the Sixth Circuit first noted that Ms. Clark's failure to offer any proof of a constitutionally protected property interest in her employment was fatal to her due process claim, and that she had waived this issue on appeal by failing to present evidence on this essential element of her *prima facie* case below. (Appendix pp.5-6). Additionally, the Sixth Circuit reviewed and found that Ms. Clark's unchallenged status as an at-will public employee left her no constitutionally

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[3] Petitioner does not raise as error in the Petition the District Court or Court of Appeals rulings dismissing the defamation claim against Ms. Burns, and accordingly this claim is not addressed further in this response to the Petition.

protected property interest in her employment. (Appendix p.6).

B. Correction of Misstatements in the Petition.

The opinions of the Sixth Circuit and the District Court correctly set forth the facts of this case and Respondents respectfully direct the Court's attention to the lower courts' opinions. Pursuant to United States Supreme Court Rule 15.2, however, Respondents bring to the Court's attention the following misstatements of facts contained in the Petition.

In the Questions Presented for Review, and again in the Argument, the Petitioner incorrectly asserts that EPB had adopted procedures requiring "cause" be found for an employee's termination. (Petition, pp.i, 4). There is nothing in the record supporting this assertion. Conversely, the evidence in the record establishes that Ms. Clark was an "at will" employee and could be dismissed at any time for any or no cause.[4]

The Petitioner also incorrectly asserts that EPB had adopted a policy providing its employees with a "right"

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[4] The employment application signed by Ms. Clark states that she could be terminated at any time at the will of EPB. (JA 104). Ms. Clark acknowledges in her deposition that she could be dismissed at any time with or without cause. Ms. Clark testified that she knew that she could be dismissed from her employment with EPB even "if they don't like the color of your eyes." (JA 65-66). The Plaintiff had no contract of employment with EPB, nor was she given any expectation of employment for a specific period or a permanent basis. EPB employees are not subject to any civil service or tenure system. (JA 152).

to a hearing. (Petition, p.4). The uncontroverted deposition testimony of Ron Earl was that it was his practice to make a hearing available to those employees in his department when he felt that the discipline taken against them made such a hearing appropriate, or when a hearing was recommended by the supervisor. (JA 190-91). Nowhere in the record is there any evidence of the existence of any policy providing EPB employees with a "right" to such a hearing.[5]

In the Questions Presented for Review and the Argument, the Petitioner also incorrectly states that Ron Earl, the hearing officer, had "admittedly" made up his mind to discharge the Plaintiff prior to the hearing and that he had based this decision on information not received at the hearing. (Petition, pp.i, 3, 5). The Plaintiff has presented absolutely no evidence to support this contention, and the deposition of Ron Earl, the only evidence submitted by the Plaintiff in opposition to the motion for summary judgment, specifically contradicts this assertion. Mr. Earl's unchallenged testimony states that he maintained

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[5] Although not presented as error for review, the Petitioner incorrectly asserts that this alleged EPB policy was sufficient to create a constitutionally protected property interest in the Petitioner's employment. (Petition, p.4). This is simply a misstatement of the law. In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985), a case cited by the Petitioner, this Court stated, "The categories of substance and procedure are distinct . . . 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty." As another court stated, the petitioner's argument "attempts to construct a property interest out of procedural timber. . . . " *Bunger v. University of Oklahoma Bd. of Regents*, 95 F.3d 987, 990-91 (10th Cir. 1996).

an open mind prior to the hearing and based his decision upon the evidence presented at the hearing. (JA 154-55, 209-10).

The Petitioner further mistakenly asserts that the Plaintiff was not informed of the evidence being considered against her and was discharged over matters of which she was not notified. (Petition, pp.i, 3, 5). Again, not only has the Petitioner presented no evidence in support of this contention, the evidence in the record directly contradicts it. The Plaintiff was informed by the memorandum from EPB supervisor Alice Glenn of the reasons that Ms. Glenn was recommending that the Plaintiff be dismissed. (JA 105). At the hearing held by Ron Earl, the Plaintiff admitted that she secretly attempted to tape record her meeting with the supervisors, and the Plaintiff's attorney introduced the personnel evaluations in her file as evidence of her past performance record. (JA 154). On the basis of this evidence, Mr. Earl affirmed the decision to dismiss the Plaintiff from her employment. (JA 107, 155, 229).

The Petitioner also incorrectly asserts that she was not allowed to review her personnel file, nor was she shown its contents. (Petition, pp.i, 3, 5). Again, the Plaintiff has introduced no evidence that she ever made, or was denied, a request to review her personnel file or any other documents presented at the hearing. Indeed, it was the Petitioner's attorney who introduced the Petitioner's personnel evaluations as evidence at the hearing and they were considered by the hearing officer. (JA 154-55, 159-60). Furthermore, the Petitioner was specifically invited to present evidence on her behalf, and she and her attorney did so. (JA 105, 154, 159-60).

Additionally, in the Statement of the Case, the Petitioner incorrectly asserts that Ms. Clark was told by Ms. Burns that EPB might be reassigning some customer relations personnel to other shifts. (Petition, p. 2). What the record shows is that Ms. Burns told Ms. Clark that the shifts would not be permanently assigned in the department, and that customer relations personnel should be thankful that the personnel did not have to work seven (7) days a week or twenty-four (24) hours a day. (JA 147-48).

Also, Petitioner's statements in the Statement of the Case concerning Alice Glenn's recommendation of the Petitioner's dismissal are not an appropriate or correct characterization of the evidence. (Petition, p. 2). It was Ms. Clark who requested to meet with Mr. Earl to discuss problems that she denied having in the department. In this meeting, Ms. Clark admitted to Mr. Earl that she had attempted surreptitiously to tape record her meeting with her supervisor. (JA 153). It was Ms. Glenn who made the recommendation of dismissal and then prepared a written notice to Ms. Clark of her recommendation, informing Ms. Clark of the reasons for her recommendation, and notifying Ms. Clark of the availability of a hearing with Mr. Earl. (JA 159).

REASONS FOR DENYING THE WRIT

I. THERE IS NO REASON FOR THIS COURT TO CONSIDER THE CONSTITUTIONAL ISSUES RAISED BECAUSE THE PETITION DOES NOT RAISE AS ERROR THE FINDING THAT PETITIONER HAD NO CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN HER EMPLOYMENT.

This Court has held previously that a plaintiff is required to have "an enforceable claim to an entitlement" in order to assert a Section 1983 claim. *Leis v. Flynt*, 439 U.S. 438 (1979). Also, in *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972), this Court held that a plaintiff must establish the existence of a constitutionally protected property interest in employment in order to sustain a claim under Section 1983 for alleged violation of due process rights.

The Sixth Circuit in the present case found that the Petitioner's "total failure to proffer any proof of a constitutionally protected property interest was fatal to her Section 1983 action. By failing to present evidence on this essential element of her *prima facie* case below, Clark has waived that issue on appeal." (Appendix p.6). *See Travitz v. Northeast Dep't ILGWU Health and Welfare Fund*, 13 F.3d 704, 711 (3rd Cir.), *cert. denied*, 114 S.Ct. 2165 (1994); *United States v. Tracy*, 989 F.2d 1279, 1286 (1st Cir.), *cert. denied*, 508 U.S. 929 (1993). The Sixth Circuit nonetheless evaluated the Plaintiff's employment status under applicable Tennessee state law, and determined that the Plaintiff had no constitutionally protected interest in her employment because she was an employee at-will under Tennessee law, and her employment could be terminated

by either party at any time with or without cause. (Appendix p.6).

The Petitioner does not even raise as error this finding by the lower court on this essential element of Ms. Clark's claim; instead, the Petitioner asks this Court to assume that such a protected property interest existed. There is no evidence in the record to support the Petition's assumed *prima facie* case, nor is there any basis for this Court to continue to the next step of its analysis of the case, in determining whether the hearing provided to the Petitioner complied with constitutional requirements.

The Petition should be denied. It does not raise as error the lower courts' finding that the Plaintiff had no constitutionally protected property interest in employment. Therefore, the Court need not consider the issues presented for review.

II. EVEN IF THIS COURT CONSIDERS THAT THE PETITIONER WAS ENTITLED TO DUE PROCESS PROTECTION, THE QUESTIONS ASSERTED BY PETITIONER, CONCERNING ALLEGED PROCEDURAL DEFECTS, ARE NOT SUPPORTED BY THE FACTS OF RECORD.

As questions presented for review to this Court, the Petitioner asserts that the hearing provided to her had procedural defects which violated her due process rights. However, none of the alleged defects asserted by the Petitioner are supported in the record, and, where they are addressed at all by the evidence, they are contradicted by it.

The first question presented for review asserts that the hearing officer had "admittedly made up his mind to discharge Plaintiff prior to the hearing." Not only is the record in this case devoid of any evidence supporting this assertion, the record directly contradicts it. The only evidence ever submitted by the Plaintiff was the transcript of the deposition testimony of the hearing officer, Ron Earl. In his deposition, Mr. Earl specifically denied that he had made a decision prior to the hearing and asserted that he entered the hearing with a open mind. (JA 209-10). The uncontroverted statements in Mr. Earl's affidavit establish that he made his decision based upon the evidence provided at the hearing. (JA 154-55).

The second question asserts that the Plaintiff was not apprised of the evidence considered against her and that she was discharged over matters of which she was not notified. Again, there is no evidence supporting this assertion. The Plaintiff was notified of the reasons for her dismissal prior to the hearing in the memorandum given to her by her supervisor, Alice Glenn. (JA 105). Ron Earl testified that he based his decision on the information received at the hearing and primarily on Ms. Clark's admission that she attempted to covertly tape record a meeting with her supervisors. (JA 154-55, 209-10, 229). It should be noted that the Plaintiff's attorney introduced into evidence the Plaintiff's personnel file evaluations and this evidence was considered. (JA 154-55).

The third question presented for review asserts that the Plaintiff was not allowed to review her personnel file prior to the hearing. Again, there is no evidence in the record to support this assertion. There is nothing in the record showing that the Plaintiff ever requested to review

her personnel file, nor that she was ever denied the opportunity to do so.

The questions presented for review concerning alleged procedural defects in the hearing before Mr. Earl do not accurately reflect the facts in the record upon which they are dependent, and in fact, are largely contradicted by the evidence. Accordingly, further review by this Court of these questions is not necessary.

III. THE PETITION DOES NOT ASK THIS COURT TO SETTLE ISSUES OF LAW.

The questions presented for review in the Petition do not reflect any issues of law decided by the lower courts. The appellate court found that the Plaintiff had presented no evidence of a constitutionally protected property interest in her employment and affirmed summary judgment on that basis. The Petition does not even assert as error the entering of summary judgment because of no constitutionally protected property interest, but instead attempts to create factual disputes, where none exist, concerning the propriety of the hearing provided to the Petitioner. The Sixth Circuit made no such findings of facts as are assumed and asserted as error by the Petitioner. Instead, it found that the Plaintiff failed to offer any proof of a constitutionally protected property interest in her employment. The Petition does not ask this Court to settle issues of law, because the point of law on which this case was decided is not raised as error.

This Court previously has stated, "A court of law, such as this Court is, rather than a court for correction of

errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *quoting Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949), *adhered to*, 339 U.S. 605 (1950), *and superseded by statute on other grounds as stated in Haney v. Timesavers, Inc.*, 1993 U.S. Dist. LEXIS 14646 (D. Or. 1993).

Further review is not warranted by this Court because the Petition seeks review of only unsupported factual allegations, and not of issues of law.

IV. RESPONDENT KATHY BURNS IS NOT A PROPER PARTY BECAUSE THE PETITION DOES NOT ASK THIS COURT TO REVIEW THE LOWER COURT'S DISMISSAL OF ALL CLAIMS AGAINST HER.

As previously noted in the Statement of the Case, the Plaintiff asserted only a state law claim of defamation against Kathy Burns. The District Court granted summary judgment in favor of Kathy Burns and dismissed this claim. The Sixth Circuit then affirmed the dismissal of this claim because the Plaintiff had failed to raise any issue that Ms. Burns intended to maliciously harm the Plaintiff by her alleged statements, or that the statements constituted a serious threat to the Plaintiff's reputation. The Petitioner does not ask this Court to review this dismissal of the state law claim against Ms. Burns and there are no other claims pending against her for review. As the Rules of the Supreme Court state, "Only the questions set forth in the petition, or fairly included

therein, will be considered by the Court." Rule 14.1(a), Rules of the Supreme Court of the United States. Consequently, Ms. Burns is not a proper party to this Petition and it is asked that she be dismissed as a named Respondent.

CONCLUSION

Respondents respectfully submit that this case presents no issue of law or fact that justifies review by the United States Supreme Court. Petitioner has had appropriate review at both the district and appellate court levels. The decisions of these courts are proper and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CARLOS C. SMITH,
Counsel of Record
CHRISTINE MABE SCOTT
J. ROBIN ROGERS
Attorneys for Respondents
STRANG, FLETCHER, CARRIGER,
WALKER, HODGE & SMITH, PLLC
400 Krystal Building
One Union Square
Chattanooga, Tennessee 37402
(423) 265-2000

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 95-6196

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kimberly CLARK, Plaintiff-Appellant, v. Kathy BURNS and the Electric Power Board of Chattanooga, Tennessee, Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

(Filed Jan. 9, 1997)

BEFORE: KRUPANSKY, BOGGS, & SILER, Circuit Judges.

PER CURIAM. Plaintiff has appealed from a district court's grant of summary judgment for defendants on her complaint, which alleged a federal civil rights violation and a state law defamation claim. Plaintiff has averred two errors: (1) the district court improperly concluded that a hearing afforded by her former employer, defendant Electric Power Board of Chattanooga, Tennessee ("EPB"), prior to her termination protected and preserved her right to due process guaranteed by the Constitution; and (2) the district court erroneously concluded that plaintiff presented insufficient evidence to sustain a cause of action for defamation against her former supervisor, defendant Kathy Burns ("Burns").

Since 1986, plaintiff, Kimberly Clark ("Clark"), worked for the EPB, a quasi-governmental organization, as an at-will employee in its Customer Information Center ("CIC"). The CIC staggered seven shifts of representatives to respond to customers' concerns via telephone between the hours of 7:00 AM and 8:00 PM, Monday through Friday. To the dissatisfaction of Clark, the shifts were rotated among employees on a monthly basis. Her displeasure escalated and during 1992 and 1993 Clark frequently expressed her objection to her immediate supervisor, defendant Burns. Clark repeatedly suggested that Burns assign employees to work particular shifts on a permanent basis, rather than rotate them. Although Clark's proposal was consistently rejected by Burns, her response on one particular occasion gave rise to the instant controversies.

Burns related that during a private meeting on May 6, 1993, she dismissed Clark's complaint as usual and then explained, "[W]e should all be very thankful that we do not have to work 24 hours per day, or 7 days a week, as a lot of companies require their employees to do." Clark remembered the conversation differently. She has contended that Burns said there was a "possibility" that the department would inaugurate 24 hour shifts, weekend shifts, and monitoring of all telephonic conversations. Irrespective of what Burns actually said during this discussion, on the following day two CIC employees reported to her that Clark had cautioned them about impending changes in the working shifts. Apparently, Clark had informed some CIC employees that the EPB planned to add several additional shifts in order to cover an extensive schedule of 24 hour days, 7 days a week.

(J.A. at 148.) Unhappy with this notion, some employees contemplated resignation and one promptly submitted a transfer request.

Burns attempted to quiet unrest in the department by explaining that the rumor was false. In the course of her efforts she purportedly denounced Clark as a liar, giving rise to the instant defamation charge. Burns also contacted her immediate supervisor, Alice Glenn ("Glenn"), the Superintendent of the Customer Service Department, to discuss the seminal conversation with Clark, the alleged misrepresentation by Clark of this conversation to CIC employees, and the resultant disruption caused by Clark's activities. (J.A. at 149.) Consequently, a meeting among Burns, Glenn, and Clark, to discuss Clark's alleged conduct in circulating the misinformation about the shift changes, was scheduled for May 18, 1993.

Before the meeting, Clark told some CIC employees that she secretly intended to tape record the confrontation. One of these employees informed Burns of Clark's intention. At the meeting, Burns advised Clark that she knew about the recorder, asked her to remove it, and ordered her to turn it off. The parties then discussed the events already related. Within a fortnight, Glenn's supervisor, Ronald Earl ("Earl"), also met with Clark to discuss her behavior. In both meetings, Clark denied having told the staff that the shifts would be changed and explained that she had merely indicated that shifts could be changed. Nevertheless, Clark admitted her surreptitious attempt to record the meeting with Burns and Glenn.

On May 26, 1993, Glenn prepared a memorandum advising Clark that she intended to seek her termination

from the EPB on June 1, 1993 due to her misrepresentations to the CIC employees and her covert attempt to record the May 18, 1993 meeting. Both Glenn and Burns proceeded to Clark's work station, requested her to read the memorandum, gather her belongings, and leave the premises. However, Clark was permitted to remain on the payroll until the EPB afforded her an opportunity to appeal her termination at a hearing before Earl on June 1, 1993. Legal counsel represented Clark at this appellate hearing. After introductory remarks by Earl, Glenn presented her reasons for recommending Clark's termination, including the dissemination of disruptive misinformation among CIC employees and the furtive attempt to tape record a meeting with supervisors. Clark responded to the first charge by denying that she misinformed the other employees because she had purportedly only told them that shift changes were under consideration. She admitted the second charge. Clark's attorney introduced her personnel file into evidence and noted her history of generally positive evaluations and a seven percent pay increase on May 1, 1993. Clark presented no other evidence and called no witnesses. On the next day, Earl issued a letter to Clark upholding Glenn's recommendation to dismiss her. He concluded that Clark's behavior constituted insubordination and misconduct on the job.

Clark sought judicial redress in the Circuit Court of Hamilton County, Tennessee, and the case was removed to the United States District Court for the Eastern District of Tennessee. The district court confronted two legal issues. First, Clark sought to invalidate Earl's decision of termination because the EPB appellate process allegedly

violated 42 U.S.C. § 1983. Second, Clark sought to recover damages from Burns because the nature of her announcement that Clark had misstated the truth allegedly constituted defamation under Tennessee law. The district court favored both defendants on summary judgment.

This court reviews appeals from grants of summary judgment under a *de novo* standard. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). In this context, such analysis asks the court to assess "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). In its pursuit of this goal, the court must "draw all justifiable inferences in favor of the non-moving party." *Winningham v. North American Resources Corp.*, 42 F.3d 981, 984 (6th Cir. 1994). Nevertheless, "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Liberty Lobby*, 477 U.S. at 252 (1986). At least one genuine issue of material fact must exist. *Middleton v. Reynolds Metals Co.*, 963 F.2d 881, 882 (6th Cir. 1992). A fact is material if it will "affect the outcome of the suit under the governing law. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Liberty Lobby*, 477 U.S. at 248.

The district court concluded that Clark was not entitled to recover under her § 1983 claim because she did not assert a constitutionally protected right to continued employment, and even assuming that she had, the EPB had given her all of the due process protection afforded

by law. Because a § 1983 plaintiff must prove a constitutionally protected interest as a condition precedent to the court's cognizance of the claim, *see Ramsey v. Board of Education*, 844 F.2d 1268, 1272-73 (6th Cir. 1988), Clark's total failure to proffer any proof of a constitutionally protected property interest was fatal to her § 1983 action. By failing to present evidence on this essential element of her *prima facie* case below, Clark has waived that issue on appeal. *See Travitz v. Northeast Dept. ILGWU Health and Welfare Fund*, 13 F.3d 794, 711 (3d Cir.), *cert. denied*, 114 S. Ct. 2165 (1994); *United States v. Tracy*, 989 F.2d 1279, 1286 (1st Cir.), *cert. denied*, 508 U.S. 929 (1993); Fed. R. App. P. 28(a)(3), (5), and (6); *cf. John v. Barron*, 897 F.2d 1387, 1393 (7th Cir.), *cert. denied*, 498 U.S. 821 (1990).

Regardless, because the sufficiency of a claim to a property interest in employment must be decided by reference to state law, Clark's unchallenged status as an at-will public employee in Tennessee left her no constitutionally protected property interest in continued employment. *See Gregory v. Hunt*, 24 F.3d 781, 784-85 (6th Cir. 1994). In Tennessee, an employee hired for an indefinite period is an employee-at-will, and the employment can be terminated by either party at any time with or without cause. *See Graves v. Anchor Wire Corp.*, 692 S.W.2d 420 (Tenn. Ct. App. 1985). Consequently, the district court's dismissal of Clark's § 1983 claim is AFFIRMED.

Clark's defamation claim must also fail because even if this panel were to regard the facts most favorably to

her claim,[1] Tennessee law follows the general rules that "false statements do not constitute actionable defamation merely because they are false and that the burden of proof rest[s] upon the plaintiff to demonstrate that the [statement] was, in fact, defamatory because it tended to injure plaintiff in h[er] trade, profession, or community standing, or lower h[er] in the estimation of the community or subject h[er] to scorn, ridicule, shame, contempt, or embarrassment." *Connaughton v. Harte Hanks Comm., Inc.*, 842 F.2d 825, 840 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989); *see Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 820 (Tenn. 1994) ("The basis for an action for defamation, whether it be slander or libel, is that the defamation has resulted in an injury to the person's character and reputation"); *cf. Stones River Motors, Inc. v. Mid-South Pub. Co.*, 651 S.W.2d 713, 719 (Tenn. Ct. App. 1983) ("For a communication to be libelous, it must constitute a serious threat to the plaintiff's reputation. A libel does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element 'of disgrace.' ") (quoting W. Prosser, *Law of Torts*, § 111 (4th ed. 1971)). Because Clark has failed to raise a genuine issue that anyone intended to harm her maliciously or that the

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[1] Clark's own conflicting renditions of the facts undermine the credibility of her accounts. In the complaint, Clark alleged that Burns reported plaintiff's "lie" about shift changes to the EPB management. (J.A. at 10 (Vol. I).) In her deposition, Clark alleged that Burns reported plaintiff's "lie" to the employees in the CIC. (J.A. at 43 (Vol. II).)

statements constituted a serious threat to her reputation, the district court's rejection of Clark's defamation claim is AFFIRMED.

Accordingly, the district court's judgment of August 24, 1995, is hereby AFFIRMED.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

KIMBERLY CLARK Plaintiff, v. KATHY BURNS, and ELECTRIC POWER BOARD OF CHATTANOOGA, Defendant.	)	No. 1:93-CV-356 Collier/Powers

MEMORANDUM

Currently before the Court are the defendants' Kathy Burns and Electric Power Board of Chattanooga motions for summary judgment and the plaintiff's response thereto.[1] Both named defendants move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, as to the complaint of plaintiff Kimberly Clark for deprivation of due process rights in her dismissal from employment at the Electric Power Board. (Court File No. 1). Defendants' motions are **GRANTED** and all claims against these defendants are **DISMISSED** with **PREJUDICE** for the following reasons:

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[1] Plaintiff's motion for response to be timely filed is **GRANTED**.

I.

BACKGROUND

The following summary of facts is compiled from the pleadings of the parties and their supporting evidence.

The plaintiff in this matter, Kimberly Clark (hereinafter Clark) was an employee for the Electric Power Board (EPB) serving as a customer adviser in the Customer Information Center (CIC). The CIC is the information center which receives phone calls from the public regarding various matters concerning the payment, maintenance and other services connected with the EPB's duties to the public. As a customer advisor Clark received approximately 100 phone calls a day from the public and could receive as many as 300 phone calls a day. (Court File No. 27, Burns Affidavit; Clark Deposition.).

Clark began working with the EPB as a temporary employee and was hired as a full time employee in December of 1986. EPB employees are not subject to any civil service or tenure system. (Court File No. 27, Earl Affidavit.). Mrs. Clark was not given a contract of employment and was hired as an "at will" employee. (Court File No. 27). Clark was later promoted to her last position of Customer Adviser. Electric Power Board Employees in the CIC work seven hour shifts which are staggered throughout the week. These shifts were supervised by defendant Burns and all decisions concerning shift assignment were made by Burns.

On May 6, 1993, Clark spoke to Burns about changing the current shift assignments to permanent shifts assignments. Burns allegedly said that she would not change

the shifts. After this discussion, Clark spoke about a change in the shift rotation to various employees resulting in turmoil and unrest within the department. Some employees contemplated transfers to other departments to avoid the reported changes that were going to take place.[2] Burns learned that Clark had made these statements regarding a shift change and held a meeting with the employees of the department to inform them that the information was false. On May 18, 1993 Clark met with Burns to discuss her alleged conduct in spreading this information. Also present at this meeting was Burns' immediate supervisor, Ms. Alice Glenn.

In order to record the conversations that took place during this meeting, Clark entered Burns' office with a tape recorder hidden under her clothing. Unknown to Clark, however, another employee had informed Burns of Clark's attempt to secretly record the remarks made during the meeting. Burns requested that Clark remove the recorder and turn it off. After Clark complied with this request, the parties discussed the statements made by Clark concerning shift changes. Clark alleges that during this discussion Burns called her a liar and said that she intentionally lied to create disorder in the department. Burns denies that she called Clark a liar. Mr. Ronald D. Earl, the manager of the division which includes the CIC and Ms. Glenn's immediate supervisor, was informed of Clark's conduct and met with Clark on May 26, 1993. (Court File No. 27, Earl Affidavit.). At this conference

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[2] The motions made by the defendants state that several employees were concerned about being assigned late shift hours permanently due to their lack of seniorty.

Clark admitted to secretly attempting to tape record the Burns meeting. After the meeting, Earl told Clark to return to her workstation. Later that day, Clark was given a memorandum informing her that her employment with EPB was to end June 1, 1993 due to misrepresentations and attempting to record the meeting with Burns. (Court File Numbers 27, 29, and 1). Clark was then given an opportunity to appeal her termination at a June 1 hearing. Clark attended the meeting with her attorney and continued to receive her regular pay until the date of the hearing. (Court File Numbers 27, 29, and 1). At the hearing Clark presented positive evaluations from her personnel file and presented no other evidence. However, the plaintiff argues that she was denied opportunity to be heard. (Court File No. 1). On June 2, 1993 Clark was fired by Earl who stated that enough evidence was presented at the hearing to warrant her dismissal.

Clark sued in the Circuit Court of Hamilton County, Tennessee and this suit was removed to the United States District Court on August 26, 1993. The plaintiff claims that her substantive and procedural due process rights were violated by EPB when they dismissed her, depriving her of her property right in her employment. Plaintiff Clark further alleges that Kathy Burns' statements about her lying were improper and constitute defamation under Tennessee law. (Court File No. 1).

II.

DISCUSSION

A. Summary Judgment Standard:

Fed. R. Civ. P. 56(c) provides that summary judgment will be rendered if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to show conclusively that no genuine issue of material fact exists, and the Court must view the facts and all inferences in the light most favorable to the nonmoving party. *Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406 (6th Cir. 1994); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943 (6th Cir. 1990); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial solely based on allegations. The nonmoving party must come forward with some significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Kentucky Horsemen's Ass'n*, 20 F.3d at 1411; *White*, 909 F.2d at 943-44; *Ivy Street*, 822 F.2d at 1435. The moving party is entitled to summary judgment if the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which it has the burden of proof. *Celotex*, 477 U.S. at 323; *Kentucky Horsemen's Ass'n*, 20 F.3d at 1411.

The trial court's function at the point of summary judgment is limited to determining whether sufficient

evidence has been presented to make the issue of fact a proper jury question, and not to weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S 242, 249 (1986); *60 Ivy Street*, 822 F.2d at 1435-36. The standard for summary judgment mirrors the standard for directed verdict. The court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury as a matter of law." *Anderson*, 477 U.S. at 251-52. There must be some probative evidence from which the jury could reasonably find for the nonmoving party. If the Court concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based upon the evidence presented, it may enter summary judgment. *Id.*

B. Fifth and Fourteenth Amendment Allegations:

The plaintiff in her complaint alleges that EPB violated her procedural and substantive due process rights when they dismissed her from her position thereby depriving her of property and violating the Fifth and Fourteenth Amendments of The United States Constitution and 42 U.S.C. § 1983. EPB in its motion for summary judgment argues that it took all of the necessary steps to ensure that Clark's due process rights were maintained and that her dismissal was justified.

The plaintiffs must establish in its Section 1983 claim the existence of a constitutionally protected property interest. *Ramsey v. Board of Education*, 844 F.2d 1268 (6th Cir. 1988); *Leis v. Flynt*, 439 U.S. 438 (1979) (a plaintiff must have enforceable claim to assert a Section 1983 claim); *Riverview Investment Inc. v. Ottawa Community*

Improvement Corp., 769 F.2d 324, 327 (6th Cir 1995); *Gregory v. Hunt*, 24 F.3d 781, 785 (6th Cir. 1994); *Bennet v. Steiner-Liff Iron and Metal Co.*, 826 S.W.2d 119, 121 (Tenn. 1992). Here the plaintiff asserts a property interest claim resulting from her employment. The sufficiency of the claim to property interest in employment must be decided by reference to state law. *Bishop v. Wood*, 426 U.S. 341 (1976); *Perry v. Sinderman*, 408 U.S. 593, 601 (1972); *Woosley v. Hunt*, 932 F.2d 555 (6th Cir 1991). In *Duncan v. Onida* this Court held that "the State of Tennessee does not grant by statute, or otherwise, a right to continued public employment." *Duncan v. Onida*, 564 F.Supp. 425, 426 (E.D. Tenn. 1983) aff'd, 735 F.2d 998 (7th Cir. 1984). The Tennessee Supreme Court has held:

> "a public employee is not deemed to have a contract of employment within the meaning of the 'impairment of contract' provisions of the state and federal constitutions unless the employee is affected by a tenure or civil service system."

Blackwell v. Quarterly County Court, 622 S.W.2d 535, 539 (Tenn. 1981). *See also Garvie v. Jackson*, 845 F.2d 647 (6th Cir. 1988); *Bush v. Johnson*, 602 F.Supp. 96 (E.D. Tenn. 1985).

Applying the above law to the facts, the Court finds that the plaintiff has not asserted a constitutionally protected right to continued employment. The affidavits submitted by the defendants, and uncontested by the plaintiffs, showed that Clark was not under any form of durational employment contract while she was employed with EPB. (Court File No. 27, Earl Affidavit; Clark Deposition, page 33, lines 14-24). All of the evidence presented

shows that Clark was an employee at will and that she understood this. The standard for summary judgment is to view the evidence in the light most favorable to the nonmoving party. *Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc.*, 20 F.3d 1411 (6th Cir. 1994); *White*, 909 F.2d at 943 (6th Cir. 1990); *60 Ivy Street Corp.*, 822 F.2d at 1435 (6th Cir. 1987). The nonmoving party must come forward with some significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Kentucky Horsemen's Ass'n*, 20 F.3d at 1411; *White*, 909 F.2d at 943-44; *Ivy Street*, 822 F.2d at 1435. The plaintiffs have brought forward no evidence to contest the affidavits of Earl or Burns. (Court File No. 35, Plaintiffs Response to Summary Judgment). Further the plaintiff has only supported the statements of the defense by submitting the entire uncontested deposition of Mr. Earl which clearly says that the plaintiff is employed at will. The plaintiff has failed to come forward with significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Kentucky Horsemen's Ass'n*, 20 F.3d at 1411; *White*, 909 F.2d at 943-44; *Ivy Street*, 822 F.2d at 1435.

The plaintiff also asserts that her procedural due process rights were violated by the manner in which the dismissal took place. The Supreme Court along with the Sixth Circuit held that the due process clause requires specific measures in the dismissal of a government employee. A public employee with a property interest in her employment must be given oral or written notice of dismissal, an explanation of the employer's reasons for the dismissal, and an opportunity to be heard. *Loudermill*

v. Cleveland Board of Elections, 844 F.2d 304, 310 (6th Cir. 1988) on remand from *Loudermill*, 470 U.S. 532. Justice White, writing for the majority in *Loudermill* held that an employee is only entitled to these actions because the purpose of the process is to ensure that the discharge is not a mistake. *Loudermill*, 470 U.S. at 546. Due process demands a pretermination hearing be held to determine if the termination is being done on reasonable grounds. *Id.* This hearing does not have to be elaborate, it need only provide an opportunity to be heard. *Id.* To require more would unnecessarily burden the government when terminating unsatisfactory employees. *Id.*

Clark argues that she was denied due process protection; however, her pleadings state the opposite. According to the complaint, Clark was informed of her habits, given a letter of discharge and a hearing to appeal her discharge. (Court File No. 1). Under the ruling of the Supreme Court and the Sixth Circuit she was given due process protection. Affidavits and depositions presented by both sides acknowledge that Clark had an opportunity to be heard, and this opportunity is all that the law requires. (Court File No. 27, Earl Affidavit, Burns Affidavit, and Memorandum of Recommendation for Termination). Evidence proffered by the defense shows that Clark was aware that the appeal was her opportunity to be heard on the issue of dismissal.[3] (Court File No. 27). Thus, Clark was given all of the due process protection

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[3] According to the evidence proffered by the defense, uncontested by the plaintiff, Clark brought her attorney with her to the appeal hearing.

afforded by the law; she was given notice (a memorandum) and an opportunity to be heard.

It is for the reasons stated above that the Section 1983 claims alleging a violation of due process must be dismissed with prejudice against the named defendants in this case.

C. Defamation Allegations:

The complaint of Clark alleged that defendant Burns defamed her character by calling her a liar. To sustain a defamation suit a plaintiff must show more than mere statements of a defamatory nature. *Dunneburke v. Williams,* 381 S.W.2d 909 (1964). To prevail in a defamation suit the plaintiff must show communications that are a serious threat to her reputation. *Stones River Motors, Inc. v. Mid-South Publishing Co.,* 651 S.W.2d 713, 719 (Tenn. App. 1983). To assert defamation the plaintiff must also show publication of the statements. *Applewhite v. Memphis State Univ.,* 495 S.W.2d 190 (Tenn. 1973). Clark alleges that Burns published these statements when Burns stated "she lied" when asked directly by an employee the validity of Clark's statements regarding the shift changes. However, the defendants have persuasively argued that the alleged statements do not constitute defamation because they were based upon disclosed facts. In support of this contention the defendants cite *Stones River Motors and Windsor v. Tennessean,* 665 S.W.2d 680 (1983). Both authorities explain the law in Tennessee regarding the publication of disclosed facts. No matter how derogatory the statements are, the statements are only an expression of opinion based upon those facts. *Windsor,* 654 S.W.2d at 686. *See*

also Connaughton v. Hearte Hanks Communications, Inc., 842 F.2d 825 (6th Cir. 1987) (generally the rule is that false statements do not form actionable defamation due to the plaintiff's burden to show that the statement was made to injure the plaintiff in his trade, professional or community subjecting her to shame, ridicule or contempt).

The defendants argue that Burn's statements were based upon information she had received from the facts. Whether she had actually received these facts is a question for a jury; however, due to the weight of authority asserting that only those statements which are a **serious** (emphasis added) threat to an individual's reputation may be considered defamation, we find that Burns' motion for summary judgment should be granted.

Further, the plaintiff must show that the statements made by Burns were done to defame her reputation. Viewing the evidence in the light most favorable to Clark, it appears that the statements, even if true, were said to explain the statements of Clark. The court must look at the statements in the context of the situation and surroundings of the event. *Connaughton*, 842 F.2d at 840. Burns has presented affidavits and depositions showing an environment of disorder regarding the shift changes. (Court File Numbers 25 and 27, Clark Deposition, pages 51-58). These depositions include statements by the plaintiff.[4] The plaintiff has not brought forth any evidence to refute the evidence offered by the defense and thus has failed to raise an issue of fact which must be brought

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[4] The Clark deposition, on page 57, has the plaintiff stating that there was a "big blowup" about various employees "getting bent out of shape" regarding a proposed shift change.

before a jury. For the above reasons the motion for summary judgment regarding the allegations of defamation is granted.

III.

CONCLUSION

The motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure from defendants Burns and Electric Power Board are GRANTED and all claims against these defendants are dismissed with prejudice.

/s/ Curtis L. Collier
CURTIS L. COLLIER
United States District Judge